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ABSTRACT

European legal traditions are bound very closely to the religious, moral, and ethical traditions of Christianity. It is therefore disconcerting to find persons involved in Catholic education, whether as students, staff, or professional educators, turning to civil authority to find just resolution of their school-related problems. It is especially disconcerting that appeals should need to be made to civil authority in an age that considers Catholic education as a ministry. Consideration of such areas of potential legal problems as teacher contracts, professional evaluations, classroom management, and student rights from the standpoint of a practically applied Christian charity can suggest positive steps to be taken that can prevent problems before they begin or can provide for easier, internal resolution of them if they arise. (Author/PGD)

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THE CATHOLIC EDUCATOR AND THE LAW

Dr. Donald J. Reitz

It is expected of a professional convention speaker that he first announce his pleasure at being privileged to address his audience, who are probably distracted by the novelties of a distant city and the enticements of vendors' wares, which I suspect provide more practical service than a number of bone-dry pedantic presentations. It is also generally expected that the speaker renounce vigorously the kind remarks of introduction, protesting his unworthiness, when in fact he submitted the copy in the first place. Nevertheless, despite the normal convention rituals and expectations, I do attest that I am indeed happy and privileged to participate with you in the 1980 NCEA Convention, for one overriding reason: I truly believe that our meeting and sharing ideas and new developments in the field of Catholic School Education is a strong and useful affirmation of our ministry. I am reminded of St. Paul's remarks in his letter to the Romans:

> For I long to see you; I want to bring you some spiritual gift to make you strong; or rather, I want to be among you to be myself encouraged by your faith as well as you by mine. (Romans 1:11-12)

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Before I begin my remarks about the Catholic Educator and the Law, I should like to make just one or two quick observations about myself, for the sole purpose of letting you know a little more clearly where I am coming from and perhaps warn you in advance of some of my personal preoccupations with a subject that is very important to me.

My work at Loyola in Baltimore is focused upon course work in our graduate programs in school management. For the past seventeen years, I have been engaged almost exclusively in explaining to my graduate students the essential relationship between philosophy and education, a relationship I am certain you will agree is vital to explore for both teachers and administrators in any educational setting, and in teaching additionally two graduate courses in education and the law. From time to time I also stray, with great delight, into the areas of the politics of education and ethics and management. Frankly, the interrelationship of these subjects never ceases to be exhilarating and, to use a pedagogical cliché, challenging. But academicians have a very strong tendency to become textbookish and, so students suspect, disconnected from the real world. Perhaps my personal concern that I too might become victim to the supposed malady of my trade led me to the rash decision to take a leave of absence, in 1976, to enter the world of crises without charisma. I accepted the position of Superintendent of Schools for the Archdiocese of Baltimore. Looking back on that decision, once a gain from the security

of the groves of academe, I have concluded that it was probably a very good decision, whether for the Archdiocese I cannot comment, but certainly for the sake of my students and my own convictions about the importance of Catholic schools in the Church today, and the value of maintaining and in some cases even expanding the central office professional support system for these schools. I can also tell you that If I was convinced before the experience of the superintendency of the usefulness of knowing school law, I am doubly convinced now.

One final point about myself, which is critical in terms of what I want to say today. I am a parent. My five youngsters are attending parochial elementary school. Really, I have never succeeded, nor do I want to, in separating my professional judgments about what is good for our schools from my parental judgment about what is good for my children. I can think of no substitute, when handling a parent complaint, for instance, for the point of view of a fellow parent, who at the same time respects the professional responsibilities of the teacher and administrator. I hope that what I say here today you will understand to be based upon not only professional competence, but also the insights of a father who cherishes in a special way the unique experience of childhood.

For my presentation of our topic this morning, I have chosen to divide my remarks into three major segments, allowing some time for a question and answer period toward the end of the hour. In the first place, I think it will be useful for me to make a few observations about the

historic relationship between the Church and the Law, a relationship which I believe has become the subject of serious question and debate in recent years. I have in mind, for example, that the civil law is despised by some as unfair and even in cases un-Christian, and such a noble structure within the Church as Canon law has in certain quarters fallen from grace. What I have to say about the Catholic teacher's response to the legal requirements involved in managing a school and teaching will be really significant only in terms of this history. Secondly, I should like to relate our sense of legal responsibility to the current thrust implied in the notion of teaching as ministry. And finally, I shall attempt to translate the whole message into some pointed remarks about specific legal responsibilities of the teacher and administrator as they are presently understood from court cases and statutes across the country. The question and answer session, even if brief, can be an elongation of the last segment, which I hope will give you an opportunity to raise practical issues as you see them in your experience.

Let me begin by making the following observation: The People of God, from ancient times, have been involved intimately with the law. We simply have to reckon with this fact, despite our disenchantment with certain civil court decisions, which seem to favor the rich over the poor, despite legislation and high court decisions that fly directly in the face of fundamental human rights, despite an accumulation of bureaucratic rules and regulations that are not tempered with reasonalbe ethical and philosophical premises and are not leavened with the higher law of charity,

despite even Our Lord's ringing condemnation of the Pharisees. I suspect Our Divine Master was so harsh in His criticism of those who live only by the intricacies of the letter of the law for the very reason that His divine mission was not to put enmity between His People and the law, but rather to show us the way to an understanding of that harmony intended from all eternity among the Divine, the natural and human order.

The history of salvation in the Old Testament is replete with the formidable efforts of God's People to discern "the law." There we find major sources of law in human history: The Book of the Covenant, The Book of the Law, the Holiness Code, the Priestly Collection, the Ritual Decalogue. On the necessity for litigation, we read in Exodus, for instance,

> The next day Moses took his seat to settle disputes among the people, and they were standing around him from morning till evening. (Exodus 18:13-14).

The passage goes on to describe in some detail how Moses established a system of courts and judges. And again, in the opening words of Deuteronomy, we find a similar account of the institution of a court system "to hear cases that arise among your kinsmen and judge fairly between man and man ..." (Deuteronomy 1:16) The very notion of Covenant, so essential to the mission of the Chosen People, involves us inevitably with legalities.

In the New Testament, during the early days of the Church, we find a concern among the community of believers for the adequate handling

disputes. In the First Letter of Paul to the Corinthians, we are given this advice by one who was certainly sensitive to litigation and who, remember, invoked quite shrewdly his Roman citizenship, in order to escape a court sentence in the midst of some very tacky judicial process:

> If one of your number has a dispute with another, has he the face to take it to pagan law-courts instead of to the community of God's people? It is God's people who are to judge the world; surely you know that. And if the world is to come before you for judgement, are you incompetent to deal with these trifling cases? Are you not aware that we are to judge angels? How much more, mere matters of business! If therefore you have such business disputes, how can you entrust jurisdiction to outsiders, men who count for nothing in our community? I write this to shame you. Can it be that there is not s single wise man among you able to give a decision in a brother-Christian's cause? (1 Corinthians 6:1-6)

From these very early days of the infant Church there is clearly the recognition of the need to adjudicate, albeit not as unbelievers, but rather as believers able to enliven the processes of litigation with the law of love.

It is not surprising, therefore, to find continuously through the history of the Church a vital interaction of ecclesiastical and civil

law. Christian ethics and to a lesser extent Church councils profoundly influenced the development of Roman law, and in turn Roman law, called by Benedict the Levite in the ninth century, "the mother of all human law" and by Pope Nicholas I, "venerable," certainly left an indelible stamp upon canon law. Later, Germanic law, never hailed as was Roman law as common law, contributed to ecclesiastical regulation the principle of territoriality. After the Norman Conquest in 1066, the civil law of England began to incprporate not only the judicial concepts of Church law, such as the principle of double jeopardy, but even what had been canonical structures! By the Thirteenth century, we find Thomas Aquinas developing his magnificent treatise de Lege as part of his grander Summa Theologica, placing it adroitly in the Secunda Pars, his larger treatment on Ethics and accompanied by his treatise on Grace.

The interaction of the People of God and the Law continues through the centuries. That history is indeed complex and uneven, graced at intervals with remarkable achievements of justice tempered with love, and marred at times by pettiness and an almost pharisaical preoccupation with conformity. But at no time has the Christian community been so unwise or insensitive as to jetison its historic role of guardian of the ars boni et aequi (Domitius Ulpianus, c. 208).

Therefore, it is curious, to say the least, to find ourselves in certain respects in a position of having to be told by civil authorities how to act equitably toward others. Given the historic juxtaposition

of belief and law, given the interplay of civil and ecclesiastical process and their mutual indebtedness, and given the elaborate history of adjudication among the People of God, it is difficult to find a ready explanation for our reluctance within the Community of Believers and particularly in our profession, to devise and update processes to deal with dispute. It is even more difficult to understand an almost inordinate fear of law on the part of our Catholic school establishment when faced with the need to adjudicate. What led our lay teachers, several years ago to the National Labor Relations Board in their pursuit of the right to unionize? What failure, whether intentional or not, culpable or inculpable, propels a parent into civil court complaining that her child has been expelled without a fair hearing? How do we explain the actions of a religious employee who feels the need to hire a lawyer to settle a contract dispute in court that ought to have been adjudicated by processes within the Church community? Have we abandoned our heritage?

What I perceive to be our present uneasiness with the processes of law, especially in the area of schooling, brings me to my second observation. The only way in which we can hope to integrate successfully the requirements of charity and law with the professional necessities of our job as teachers and administrators in Catholic schools is to understand our work as ministry. Putting aside our euphemisms and jargon that seem inevitably to spill out whenever the term is mentioned, ministry in the Gospel sense obviously means caring. Clearly, a Christian

Minister has to be a person, animated by Christ, who reaches out to others with care. Notice, please, that the root meaning of that word suggests, as Webster tells us, a burdensome sense of responsibility. It is not merely an intellectual caring, or a professional caring. It is, rather, an anxiety of responsibility. It is the anxiousness we experience when we let the other person in ! Instead of saying that ministry reaches out, we ought rather to say that ministry in the Gospel sense lets the other person into our being, so that we anxiously love that person as part of ourselves. I understand that ministry as a parent. Why the hand-wringing agony over my child when he is very ill, except that part of me is ill! I truly believe that this sense of ministry as caring, as (to use Martin Buber's expression) the responsibility of an I for a Thou, ought to be the driving force of all of our professional judgments and activities. It ought to be the context of our concern for the rights of others . Our ministry as teachers and administrators ought to preclude the possibility that we really don't care about a student or teacher's right to privacy, or a fair hearing at a disciplinary process, or an equitable dismissal procedure for a teacher. As Gospel People, we not only ought not to ignore (or remain ignorant of!) the reasonable requirements of law in our handling of the classroom and school, but we ought to inspirit those requirements with the love that emanates from our ministry and ultimately from His anxious love of us, Who has let us in to His being.

Our heritage as believing people and our ministry as Resurrection people tell us in no uncertain terms that our review of legal niceties ought to be a great deal more than an informed effort to stay out of court or avoid being sued. Assuming our proper legal responsibilities in the operation of our schools ought to be a wholly different occupation than begrudgingly giving to Caesar his due. The law in our hands can be yet another tool that we use responsibly and intelligently for the Community of Faith.

With this conceptualization as background, I should like now to review with you for a few moments some of the more important areas of law that impact upon our work as teachers and administrators, particularly those areas that seem to present the most general difficulty.

Teachers' Contracts. I have the distinct impression, though I have not made a study of the issue, that in too many cases homework needs to be done on producing suitable, equitable, and professionally viable teacher contracts in our schools. First of all, I don't think a teacher ought to be asked to render service without the protections of a contract. Friendly understandings and presumed good will too quickly dissipate in the heat of crisis or the pressure of economic exigency. How many teachers, for instance, have been bumped from a job because cheaper talent suddenly became available? But a contract is a bi-lateral agreement. Contract language that protects only the employer is neither good law

nor Christian charity. Likewise, language that is foggy, evasive, or merely poetic, does not serve the purpose well and in fact may under scrutiny turn out to be invidious. For instance, if we expect our teachers to be involved with youngsters as witnesses of moral living and the Gospel values, why not say so, clearly and forthrightly, as a condition of employment? In this regard, if I may be excused for saying so, I believe the standard teacher contract used in the Archdiocese of Baltimore can be a model. What about causes for dismissal? "Unsatisfactory service" can mean anything from gross negligence and moral degradation to a failure to honor the whims of some egotistical supervisor. Causes for dismissal ought to be clear, definable in some functional sense and limited. In fact, language throughout the contract ought to exhibit the positive virtue of clarity. Is the philosophy of the school amply set forth? Are other documents, such as diocesan or school policy handbooks, included by reference? Are they available to teachers? Are ancillary duties expected of the teacher clearly enunciated in contract addenda? Should a dispute arise about the mutual obligations of teacher and school, does the contract include or refer to ample due process procedures for resolving the difficulty? How can the teacher or school appeal an unfavorable decision? Again, if I may say so, the Baltimore Archdiocese two years ago initiated a Court in Equity for the resolution of these and similar disputes. The Court is actually an enlargement, or a "section", of the historic Archdiocesan Tribunal, which however makes use of the talents of retired civil judges, under the presidency of a

a chancery master. It has already proven its worth to our community in Baltimore as a professional vehicle of adjudication, which allows disputants to settle their affairs within the ecclesial family and without the burden of heavy legal expenses. I heartily recommend the idea.

Professional Evaluation. If an adequate personal service contract is a basic instrument for equitable employment and dismissal protections, of corresponding importance for the good of both the school and the professional employee is the process of evaluation. Unfortunately, it is perhaps also an area that needs careful reassessment. In this day and age of professionalism in parochial and Catholic education, I have to assume that some techniques are regularly utilized by the school administrator and/or the central school office for teacher evaluation. But what about the evaluation of board members and the superintendent? It is true, of course, that legal issues of dismissal are much more likely to involve the classroom teacher than other employees or functionaries. The chief problem that we continue to encounter here is either the poor documentation of teacher performance, or the total lack of such documentation. Even administrators who frequently observe and assess teacher performance are, perhaps because of a sense of charity that has become strangely inverted or some misconstrued notion of rights to privacy, all too reluctant to put into the record in a teacher's permanent file the results of administrator observations. Or else the language of the record is so abstruse or cleverly veiled that any

intelligible meaning is forever lost. What does, "She shows signs of potential growth"mean in reality? Anybody who is alive and breathing may well show some signs of potential growth! Having a suspicious turn of mind, I guess (usually correctly) that it means "Not much worth writing home about is really happening in this classroom." More damaging, no doubt, are generic negatives: "His work is not completely satisfactory;" "He needs to work on specific job targets." We have an impressive repertoire in the trade of euphemisms to camouflage the conclusion that the teacher simply doesn't know how to teach. Indeed we ought to help a teacher reach specific skill levels, but let's not use professional jargon or devices of the trade to avoid honest decisions. I can tell you that I have witnessed personally case after case of the attempts of frustrated and guilt-ridden principals to dismiss incompetent teachers whose records show nothing but high grades and commendations ! In the sorriest of events, the poor administrator, having successfully gotten an undesirable teacher to resign, selfrighteously and with clear conscience writes a glowing letter of recommendation which will land in the lap of an unsuspecting superintendent or pastor and land the teacher another job and another opportunity to remain incompetent. Occasionally, when I bring this matter up at professional meetings or seminars, some poor soul wearing a very guilty expression, will aver that it is simply too much hassle to go through a process for dismissal and run the risk of losing. So who loses? The next pastor? The next superintendent? The next 30 or 300 children? Ministry!

The language of professional evaluation becomes notably critical when we consider the emerging doctrine of expectancy of employment. Recently a number of courts adjudicating employment disputes have concluded that an employee must be given sufficient prior notice - reasonable notice- that his work is unsatisfactory and in what particulars it is unsatisfactory, so that he may have an opportunity to improve before actual dismissal. Therefore, when we fail to give clear and unmistaken notice to a teacher who is not performing according to reasonable standards of teaching conduct, a subsequent notice of dismissal may be interpreted as unacceptable by a court hearing the case. This doctrine, which I have described as "emerging," since not all courts universally follow the same reasoning, has been applied to untenured as well as tenured teachers. Obviously, what is being called for here is a fundamental sense of fair play. I don't think we really want to argue with that. The conclusion, then, in this matter of the professional evaluation of teachers and administrators is: be accurate, be honest, be reasonable, while being helpful.

Classroom Management. The heart and soul of what we are about is the classroom, the teaching - learning process. As superintendent, I used to tell my people that what I was doing in the central office probably had very little to do with a child's learning, at least in any apparent way, and that the real work of Catholic education goes on between a teacher and a child, in that interpersonal relationship that to this day defies clinical

definition. But if that teacher-student relationship (notice, I am not saying curriculum-student relationship, or teaching style-student relationship) is the heartbeat of a school, it is also the very relationship that seems, at least, to be the most often threatened by court action. Now the threat seems to be coming from two directions: litigation for tort liability and malpractice suits. Tort liability is, of course, legal responsibility for wrong committed against another's person or property outside of contract. It implies a failure of some kind on the part of the teacher or administrator to exercise reasonable care in the performance of our duties. Most often these cases involve physical injury to a youngster, but they can as well involve mental or emotional injury. Malpractice suits, as such, are a more recent development, which focus upon injury as a result of poor teaching. It is my contention that the more we become sophisticated in our teaching techniques and use of advanced testing devices, the more prone we are to litigation in this area. The reason is rather simple: as we reach the point of an "industry-wide" standard of reasonable care, we put ourselves in the position of medical practitioners. It is then possible for a plaintiff to call expert witnesses from around the circuit to testify that on a given day Miss So-and-So, the teacher, failed to used normally accepted means in her teaching (reasonable care) and thereby caused remediable injury to a student. Note that , like the medical profession, more and more teachers are purchasing malpractice insurance these days, which I guess will not deter, but encourage, future litigation.

Underlying our legal responsibilities in the classroom are some very basic notions. One I can refer to as the "safe-place concept." The reasoning, from the courtroom point of view is this: since, under compulsory education law, government has required youngsters within the school holding age to leave the presumed safety of their homes to attend school, public or private, it becomes the obligation of government through the courts to demand that a safe place be maintained at all times for these students. The crucial thing to note here is that this requirement of teachers and administrators to exercise reasonable care to maintain the well-being of the students is a consideration that overrides any other priority about learning outcomes or teaching style. For example, it may be that a given science experiment may, in point of pedagogical fact, be expected to produce a good learning situation, but the hazards of the experiment may preclude the exposure of students to it by a reasonable, prudent, person. The enticement to learning has to be replaced by the obligation of law.

In everyday practice, what does the law require of the classroom teacher? It requires that that teacher be the responsible manager of the students under her charge. It means that she will make rules for the safe conduct of activities in her classroom. It means that she will assess the condition of that room (for possible physical defects or dangers that might expose a student to harm) and the condition of her students.

What youngsters in her group have rheumatic hearts, or are prone to seizures or asthma attacks? Who has impaired vision or hearing, or an emotional disturbance that could be worsened by the uninformed handling of a teacher? The reasonable person, the prudent teacher, will need to have this awareness of her students. The safe-place concept also means that the teacher will remove a student from the immediate source of danger. Better that a youngster sit on the floor than on a broken chair. Certainly far better that a lesson plan be junked, than that a defective machine be used that may cause electric shock to an unwary pupil. The prudent teacher will report classroom defects to the proper authorities, but avoid repairing those defects herself.

In the matter of the administration of medication and first aid, special cautions are appropriate. The historic notion that a teacher stand in loco parentis has practically no place in current litigation. The courts have long ago ruled that a teacher does not have the relationship to his students that a parent has to his child. As a parent, I am free to make normal parental judgments about giving medication to my child, disciplining him, or administering first aid. Only if I seriously abuse the child and thereby transgress his rights before the law will the state step in and invade that sacred relationship. But no such sacred relationship in the legal sense exists between a teacher and a child. As a teacher, therefore, I have no privileges in the administration of medication. Even if I receive the permission of parents or the signed note of a doctor, I am not really protected against the misadministration of medicine. If I give the wrong dosage to the wrong student or overdose or underdose, I run a high degree

of risk of being accused of imprudent action. In a similar vein, in an instance where first aid seems to be called for, the rule of prudence prevails. I am really entitled only to administer that aid which is called for to preclude further immediate serious injury to the student. May the Lord deliver us from teachers who fancy themselves orthopedic surgeons and fearlessly set bones on the playground with the presumptive assurance of a specialist in the operating room!

Field trips continue to plague us in court. At least the word seems to have gotten around that the permission of the parent or legal guardian is absolutely indispensable for a child to go on a school-sponsored field trip, that is a trip off school premises. But permission for a child to go on a field trip does not relieve us of the obligations to provide for the safety of that child. The permission that parents sign should include in detail the exact destination of the trip, the mode of transportation, times of arrival and departure, and the method of supervision. Waivers that are frequently attached to the signed permission may discourage law suits, but they do not relieve the school administration and the supervising personnel of responsibility for the safe conduct of youngsters on the trip. I think we cannot be too cautious in exercising careful judgment with respect to transportation arrangements and the quality and quantity of supervision. We also need to have the courage to decide what students will

go on a field trip and which ones will not be allowed to go. School personnel are under no obligation whatsoever to take every youngster on a trip, regardless of his health condition or behavior problems. A student does not have an inherent right to participate in a field trip!

Athletic programs and shop situations invite their own peculiar disasters. Because of the types of activities and skills involved, these programs seem to generate more than their share of litigation for injury, and even death. In cases involving athletics, judges and juries have ruled unequivocally against mismatching of contestants, arbitrary discrimination, and the failure to provide safe equipment and skilled instruction. In the science labs the same courts have ruled on negligence resulting from the failure to keep dangerous substances from unauthorized use, the use of defective equipment, the failure to provide not only adequate instruction but also sufficient follow-up procedures to determine the students' level of understanding, and the exposure of students and staff to carcinogenic and pathogenic materials and organisms.

Primarily since Federal legislation in 1974, the broad issue of privacy rights in schools has been highlighted. We are all aware, I trust, that strictly enforceable procedures now determine who has access to a student's or teacher's record in school, how records may or may not be forwarded to other persons or institutions, and what steps must be taken to insure the integrity of the record when a question of accuracy is raised. The principle that emerges from this legislation is clear and rational: the physical record may belong to the school

but the contents of the record belong to the parents or legal guardians of a minor child or to the student of legal age. Frankly, since the advent of the Family Educational Rights and Privacy Act, many of our former slipshod methods of record - keeping and the communication of information have had to be radically revised. Strangely, however, I still discover diehard educators who persist in refusing to reveal I.Q. scores and other information (for example, the results of psychological testing) to parents, but who at the same time curiously exert no effort to keep student folders from the inquisitive eyes of lunch mothers or other unauthorized persons.

Finally, the notion of due process in the school situation needs to be re-emphasized. Simply put, due process means fair play, no more, no less. Of course, individual's notions of fair play differ dramatically. Not too long ago, when I had occasion to conduct a hearing on a matter involving an allegation that a teacher had physically disciplined a first grade student, I was amazed to discover the mentality of the teacher. Assault and battery charges had been brought by the parents against the teacher. In the course of the hearing, the teacher steadfastly denied disciplining the child. Finally, after considerable questioning, she finally admitted to "choking the child and slapping his face." I add with sincere sadness that the teacher in question was a religious of some twenty years experience' An odd commentary on due process.

From the point of view of the law as it is currently interpreted by the

courts, due process for students or teachers requires clear accusations, a fair hearing (that is, a hearing at which the accused has a real opportunity to present his or her side of the story, generally an opportunity for representation and an appeal. To provide less does damage not merely to the law, but more seriously to even a common conception of equity. I can find no valid reason for hesitating to revamp our disciplinary procedures in serious matters to conform with these basic provisions.

This brief recital of legal responsibilities will at least suggest what should be the parameters of our interests, and will serve to document an earlier point: the requirements of law overall can be an effective means of transforming our commitment and our high purposes in Catholic School Education into a live, Christ-inspired, caring response to the needs of our people. Anything less is mere conformism, and totally unworthy of our efforts . To the extent that we are able and willing to be caring people who minister, we need have no fear of courts and legal processes. To the extent that we take our ministry in Catholic Education seriously, we need no other motivation to acquire and use an intelligent understanding of the law in our lives as teachers and administrators.